No. 96-11

(3)

Supreme Court, U.S.
FILED
OCT 3 1996

In The

Supreme Court of the United States

October Term, 1995

CAL-ALMOND, INC., GOLD HILLS NUT COMPANY, SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., BROWNS LAKE RANCH, MAC ENTERPRISES, INC., VAN KAY, INC., and DERK VAN KONYNENBURG,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONERS

BRIAN C. LEIGHTON
Counsel of Record
701 Pollasky Avenue
Clovis, California 93612
(209) 297-6190

JAMES A. MOODY
2300 "N" Street, N.W.
Suite 600
Washington, D.C. 20037
(202) 663-9011

Attorneys for Petitioners

9047
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

13 pp

TABLE OF CONTENTS

	Page
Further Reasons for Granting the Writ	1
Conclusion	10

TABLE OF CITATIONS

Cases Cited:

Andrus v. Allard, 444 U.S. 51 (1979) 9

Chevron USA, Inc. v. National Resources Defense Counsel, Inc., 467 U.S. 837 (1984) 3

Dolan v. City Tigard, __ U.S. __, 114 S. Ct. 2309 (1994) 1, 4, 5, 7, 8, 9

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 1

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 1, 3, 5

Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992) 1

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 4, 5, 7, 8, 9

Ruckelshaus v. Monsanto, 467 U.S. 986 (1984) 1

United States v. Pewee Coal Co., 341 U.S. 114 (1951) . 1, 6

Contents

	Page
United States v. Ruzicka, 329 U.S. 287 (1946)	2
United States v. Winstar Corp., 116 S. Ct. 2432 (1996)	3
Webbs Fabulous Pharmacy, Inc. v. Beckwith, 449 U.S. 155 (1980)	4, 5, 9
Statutes Cited:	
7 U.S.C. § 601, *et seq.*	2
7 U.S.C. § 608c(15)(A)	2
7 U.S.C. § 981.67	7
7 U.S.C. § 981.81	7
United States Constitution Cited:	
First Amendment	9
Fifth Amendment	1, 9

FURTHER REASONS FOR GRANTING THE WRIT

Petitioners are growers and handlers of almonds grown in California. Not in every year, but in several years, a portion of almond crops between 1980 and 1991 was declared a "reserve." The Secretary took Petitioners' almonds (worth over $4 million) by edict. He described his action as giving himself and the Almond Board (his statutory agent) "plenary" authority, "complete" power, and "full power and authority" over Petitioners' almonds, leaving them "no voice" in the terms and conditions of the "reserve" or its disposition.

Petitioners demonstrated in the Petition that the Secretary's actions were a *per se* TAKING under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); and *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) because the character of the Secretary's action was to take ownership of the almonds leaving handlers with agency rights far less extensive and valuable than in the above cited precedents. Petitioners also showed in the alternative that the Secretary's actions were a "regulatory" TAKING under *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992); and *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) because the "reserve" regulation destroyed the value of the almonds and because the Secretary had not demonstrated that the reserves substantially advanced a legitimate governmental interest. The Government's opposition demonstrates (rather than dispels) the need to grant this Petition.

Respondent argues that the Fifth Amendment only applies to surprise TAKINGS, not to ones where the Government has given advance warning. It also contends personal property does not deserve just compensation when taken and that it has no

burden (beyond mere assertion that the reserves substantially advanced its interests. Finally, the Government argues that a TAKINGS claim can be defeated if any value remains in the property interests granted by the Secretary to his handler agents to dispose of almonds which were formerly and entirely their own. All of the Respondent's arguments must be rejected as they are not the law in this Court.

1. Respondent errs in claiming that Petitioners *contend* that the diminution in value of their almonds ordered disposed of as a reserve constituted a "TAKING". (Br. in Opp. 4). The facts demonstrate much more than a mere "diminution in value". Petitioners contend the Secretary's action constituted not only a TAKING *per se*, but a regulatory TAKING as well because the reserve did not substantially advance the governmental interest asserted.

The Secretary ordered the reserve transferred to the Almond Board of California unless the Petitioners signed up as the Secretary's agents and dumped the reserve into cattle feed or the Secretary's school lunch programs. Far more than just a "diminution" in value occurred when the reserve was imposed; the total economic value of the reserve almonds was destroyed.

2. The Respondent erroneously claims (Br. in Opp. 4 n. 2) that this action arose from the filing of a complaint in the Court of Federal Claims and is independent of any administrative petition filed by the Petitioners. The Agricultural Marketing Agreement Act (AMAA; 7 U.S.C. § 601 *et seq.*) mandates that the Petitioners exhaust administrative remedies before filing any action in federal court contesting the legitimacy of any marketing order provision. (7 U.S.C. § 608c(15)(A); *United States v. Ruzicka*, 329 U.S. 287 (1946)). Petitioners laboriously exhausted that process which resulted in the Secretary's decision that Petitioners have no rights consistent with

"ownership" remaining when a reserve is imposed. (App. 102a, 106a).

Respondent makes this argument in an attempt to divert this Court's attention from the Secretary's decision interpreting the reserve requirements of the Almond Marketing Order. He observed that once a reserve is announced the Secretary and the Almond Board have "plenary" and "complete" power over the reserve (App. 106a) and that the handlers "have no voice in deciding the terms and conditions applicable to the disposition of reserve almonds". (App. 106a). This USDA interpretation absolutely contradicts the Respondent's assertion that there was only a "diminution in value" with respect to the reserve. Since this Court gives great deference to the Agency's interpretation of the statute it is in charge of administering, *see, e.g., Chevron USA, Inc. v. National Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-45 (1984), the Respondent is now without power to reinterpret the regulatory obligations imposed upon a handler when a reserve is instituted by USDA.

The Government cannot issue a regulation, the meaning and effect of which absolutely requires the handler to give physical possession to the Government (or to dispose of the handler's property only pursuant to the authority granted through signing an agency agreement with USDA) and not have that action be called a TAKING *per se* under this Court's holding in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

3. Respondent's claim (Br. in Opp. 7) that Petitioners lost the protection of the TAKINGS Clause by entering the almond industry after passage of the Order in 1950 conflicts with this Court's "unconstitutional condition" and related precedents most recently affirmed in *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2440 (1996) (thrifts do not forego normal contract

remedies even though their industry "is one of the longest and most closely supervised of public callings."). Neither Congress nor an agency can eviscerate the TAKINGS clause by merely deciding it will assume authority to TAKE in the future.

First, as pointed out in *Webbs Fabulous Pharmacy, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) the Government "by *ipse dixit*, may not transform personal property into public property without compensation. . . . This is the very kind of thing that the TAKINGS Clause of the Fifth Amendment was meant to prevent." Moreover, even though the Government had taken interest on interpleaded court accounts for years, this historical fact was so unimportant that it was not even mentioned in this Court's TAKINGS analysis.

Secondly, this Court very recently, in *Dolan v. City Tigard*, __ U.S. __, 114 S. Ct. 2309 (1994) rejected, by implication, the City's argument that Mrs. Dolan's application for a building permit to expand her hardware store was subject to the City's unfettered conditions because the City had its master land use plan authorizing those conditions in place for years prior to her application.

In addition, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) this Court rejected, by implication, the Coastal Commission's argument that since its plan had been in place for years prior to the Nollan's applying for their permit that they could attach whatever conditions they wanted in exchange for granting that building permit.

In addition, there is no mandatory reserve each year. Indeed, it is only *after* all of the cultural costs have been expended by the Petitioners in producing and processing the crop in question that the Secretary decides whether he will issue a reserve for that year. Respondent has not claimed or shown

that that the value of the land and/or almonds when acquired by Petitioners was discounted by the market to reflect any reduction in value to potential speculative future reserves.

Simply stated, the Government cannot destroy property rights and avoid payment of compensation by merely enacting some statute that gives it the authority to take a person's property in the future.

4. The Respondent erroneously claims (Br. in Opp. 7) that the economic impact of the reserve requirements on the Petitioners' operations was "minimal". The reserve taken by the Secretary in the years in question amounted to millions of pounds of almonds worth more than $4 million. The Secretary can no more take 100 pounds of almonds than it can take 50 million pounds of almonds. For example, in *Webbs Fabulous Pharmacy*, the government only took the "interest", it did not take the principal. In *Dolan*, the City only wanted to take enough land for a "bike path", a small portion of *Dolan's* property. In *Nollan*, the Coastal Commission was "only taking an easement", and in *Loretto*, the Government's occupation of Loretto's property consisted of a device no bigger than a "bread box".

There would be no question that if the Government drove in to the Petitioners' place of business, and, with the assistance of forklift, removed a bin of almonds and took it to Desert Storm, that a TAKING would have occurred. The Government can no more take the Petitioners' almonds with an ink pen than they can with a forklift, and a TAKING occurs whether the property TAKEN was held in a bin or in an entire warehouse.

5. Respondent improperly puts controlling weight on a number of property rights allegedly retained by the handlers when the Secretary announces a reserve (Br. in Opp. 8) under

which the handler can receive the proceeds from the sale of the almonds, can determine in which reserve outlets they will market their almonds, and they can ("unless they *elect to* relinquish the almonds to the Board") retain continual physical control and custody over the almonds.

The Respondent's argument fails dramatically as a result of its failure to come to grips with, let alone even mention, the Secretary's decision which held that when a reserve is announced, the Almond Board has "complete" and "plenary" control over the reserve. The Government cannot avoid paying compensation for TAKING almonds, just because it gives the property owner the "choice" of involuntarily transferring possession directly to the Government or involuntarily transferring possession to a charity of which the Government approves. In *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (misconstrued by the Respondent, Br. in Opp. 11) this Court held that the Government's announcement that it was taking over coal mines in response to a nationwide strike, amounted to a TAKING even though the operator of the mine could continue to operate it "on behalf of the Government", and was entitled to keep whatever profits were made. It was of no decisional significance to this Court, in deciding that a TAKING had occurred, that the "owner" of the mine was allowed to continue to operate it or keep the profits from the sale of the coal. In this case, the returns for the sales of the reserve almonds to the outlets blessed by the Secretary do not even recoup the costs of producing and handling those almonds. Those costs are not recouped whether the handler relinquishes physical custody to the Secretary or signs up as the Secretary's agent and sells them at the same loss to the worthless outlets allowed by the Secretary.

To claim that the Petitioners' property rights were not affected because the Petitioners could opt to become the

Secretary's agent and thus keep "physical" control over the almonds defies what is historically meant by property rights. In addition, the Petitioners, if they "elected" to be drafted into the Secretary's "army", were required to dispose of those almonds by September 1 of the following crop year (7 C.F.R. § 981.67) and if not, physical possession was required to be transferred to the Almond Board. Thus to claim the Petitioners' rights were minimally infringed is specious.

6. The Respondent errs (Br. in Opp. 8 n.5) by claiming that Petitioners' property rights are defined by the total amount of available almonds, and not just the amount of reserve almonds. This Court held in *Lucas v. South Carolina Coastal Counsel*, __ U.S. __, 112 S. Ct. 2886, 2889, n. 7 (1992) that one must look at the property in question to determine whether or not the property is divisible or what would be the unit in question. With respect to almonds, handlers pay growers a certain amount of money *per pound*, almonds are sold by handlers *by the pound*, and the Secretary imposes assessments on the handlers *by the pound*. (7 C.F.R. § 981.81; App. 184a). As stated previously, the Secretary can no more drive away with one bin of the Petitioners' almonds than he can drive away with all of the almonds, without paying just compensation.

7. The Government's argument that the Secretary's regulatory scheme benefits Petitioners is erroneous and without foundation. (Br. in Opp. 8-9). This alleged fact was totally unproven. While the Secretary could withstand a challenge under the Administrative Procedures Act in issuing a reserve (because a challenge such as that would require a Petitioner to show that the Secretary's decision was arbitrary and capricious) that is *not* the test employed in determining whether a regulatory TAKING has occurred. As this Court pointed out in *Dolan and Nollan*, the Government must show that the regulation "substantially advances a legitimate governmental

interest." That is far more than just showing that it is not arbitrary and capricious. This case was decided by the court on the Government's motion to dismiss for failure to state a claim. There was no undisputed evidence presented by the Government that the reserve announced by the Secretary in the years in question "substantially" advanced the governmental interest in orderly marketing. Indeed, in Petitioners' complaint and in its undisputed facts for their motion for summary judgment, the exact opposite was shown. (App. 123a-126a; 144a-146a).

Secondly, the Federal Circuit's and the Claims Court's statement that Petitioners' "business as a whole" was profitable, despite the reserve, is *not* the test in a TAKINGS case. Obviously, the *Dolan's and the Nollan's* property were still worth considerable amount of money despite the attempt of Government regulation for a bike path and easement, respectively, and so was *Mrs. Loretto's* apartment building in New York despite its bread box-sized cable box. No doubt General Motors would still be profitable if the Government took 100 cars per year off its assembly line for the Government's use, but the Government would still have to pay General Motors just compensation.

For the same reasons, the Respondent's conclusory statement (Br. in Opp. 12) that the reserve requirements substantially advance a governmental interest is without support in the record, and if this Court were to hold that there was not a *per se* "TAKING" under the reasoning of *Loretto*, Petitioners are entitled to a trial on the merits to determine whether the Secretary's reserve substantially advanced its interest in orderly marketing and increasing returns. Under this Court's holding in *Dolan and Nollan*, the fact that the Government thinks it substantially advances its interest is simply not enough.

8. Respondent erroneously claims (Br. in Opp. 12) that the Petitioners cannot rely on *Dolan and Nollan* because those cases dealt with real property, and in this case there is a "commercial regulation of personal property". Nowhere in TAKINGS jurisprudence, and no where in the Fifth Amendment is the Government given more rights to take personal property than real property. It was of no significance in *Webbs Fabulous Pharmacy* that the property taken there was "interest" earned on money. Similarly, this Court's analysis in *Andrus v. Allard*, 444 U.S. 51 (1979), discussing whether or not the regulation of eagle feathers amounted to a TAKING, did not turn upon the fact that the eagle feathers were personal property, as opposed to real property. The Government simply can no more take almonds for its school lunch program than it can take real property to build the school in which to serve them.

The Federal Circuit has become hogtied by its own legal principle, created out of whole cloth, that if the Government decides to regulate, no one who enters that regulated industry in the future can be heard to complain about the regulations. This is simply not the law. Unfortunately, virtually all U.S. Government TAKINGS cases must be brought before the United States Court of Federal Claims, and then to the Federal Circuit, and only this Court can correct this major constitutional error being committed by the Federal Circuit. This Court in *Dolan* stated that the Fifth Amendment Just Compensation Clause is just as important as any other amendments to the United States Constitution. There can be no First Amendment jurisprudence allowing restrictions of speech or the press just because the Government has announced at an earlier date that they will restrict speech and the press in the future. There can be no such exception with respect to the Fifth Amendment.

CONCLUSION

Since the Federal Circuit has a virtual monopoly on Federal Government TAKINGS cases, it is important for this Court to correct the monumental legal error and crabbed reasoning being made by the Federal Circuit in its "regulated industry" analyses and its total misconception of TAKINGS *per se* holdings of this Court. Respectfully, the Petition for Writ of Certiorari should be granted.

Dated: October 3, 1996

Respectfully submitted,

BRIAN C. LEIGHTON
Counsel of Record
701 Pollasky Avenue
Clovis, CA 93612
(209) 297-6190

JAMES A. MOODY
2300 "N" Street, N.W.
Suite 600
Washington, D.C. 20037
(202) 663-9011

Attorneys for Petitioner